Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-1572–09 OF 2015
HAMID SULTAN, UMI KALTHUM AND VARGHESE GEORGE, JJCA
4 AUGUST 2016

Evidence — Appeal — Evidence — Judgment entered against all defendants in court below except respondent as guarantors in relation to facility agreement — Appellant appealed against decision — Whether respondent executed guarantee agreement — Whether respondent liable to appellant as guarantor

The appellant/plaintiff in the court below had entered into a facility agreement with the first defendant in the court below whereby the respondent/the fifth defendant in the court below was one of the guarantors. Judgment was entered against all the defendants in the court below but the trial court dismissed the appellant's claim against the respondent, hence this appeal. The respondent contended that he was not a director of the company and in consequence all documents related to his directorship was forged. The respondent also contended that he did not sign the joint and several guarantee and indemnity agreement ('the guarantee'). On the other hand, the appellant relied on the evidence of the witnessing solicitor of the guarantee who confirmed the execution of the guarantee. In this case, it was not in dispute that the respondent did not challenge the evidence of the witnessing solicitor during cross-examination. Further, there was also evidence in the form of a letter dated 14 September 2011 signed by the respondent as director of the first defendant in the court below relied by the appellant. The issues for court's decision were whether the respondent had executed the guarantee; and whether the respondent was liable to the appellant as guarantor.

Held, allowing the appeal with costs of RM30,000 here and below, subject to allocatur:

(1) The failure of the respondent to respond to the appellant's letter of demand and the fact that the respondent did not lodge a police report upon receiving such demand when the defence case was related to forgery weakened the probative force of the defence case. Failure to respond goes to conduct and is relevant fact and not an admission. The omission of the learned trial judge to take into account that the appellant's demand notice in a commercial matter was not responded to and the fact that no

reason or justification given for not responding to it compromised the decision making process (see paras 8(a), (d) & (e)).

(2) The rule in *Browne v Dunn* (1893) 6 R 67 could not be waived for reasons that the respondent was not represented at the time of the appellant's case and the respondent only engaged a solicitor during the defence stage. Failure to cross-examine on vital issues may on the facts of the case be deemed to be accepted unless there are other compelling evidence to say otherwise (see para 8(g)).

(3) The failure to challenge the witnessing solicitor of the guarantee was fatal to the respondent's case. Further, the letter dated 14 September 2011 which was signed by the respondent himself destroyed the respondent's case and/or his defence (see paras 8(i)–(j)).

[Bahasa Malaysia summary

Perayu/plaintif di Mahkamah Tinggi telah memasuki perjanjian kemudahan dengan defendan pertama di mana responden/defendan kelima di Mahkamah Tinggi adalah salah seorang penjamin. Penghakiman dimasukkan terhadap kesemua defendan di Mahkamah Tinggi tetapi mahkamah bicara menolak tuntutan defendan terhadap responden, maka rayuan ini. Responden berhujah bahawa dia bukan pengarah syarikat dan akibatnya kesemua dokumen berkaitan jawatan pengarahnya dipalsukan. Responden juga berhujah bahawa dia tidak menandatangani perjanjian bersama dan berasingan dan perjanjian indemniti ('jaminan'). Sebaliknya, perayu bergantung ke atas keterangan peguam cara yang menjadi saksi kepada jaminan tersebut yang mengesahkan pelaksanaan jaminan tersebut. Dalam kes ini, ia tidak dipertikaikan bahawa responden tidak mencabar keterangan peguam cara yang menjadi saksi semasa pemeriksaan balas. Selanjutnya, terdapat keterangan dalam bentuk surat bertarikh 14 September 2011 ditandatangani oleh responden sebagai pengarah defendan pertama di Mahkamah Tinggi yang digunakan oleh perayu. Isu-isu untuk keputusan mahkamah adalah sama ada responden telah melaksanakan jaminan tersebut; dan sama ada responden bertanggungjawab kepada perayu sebagai penjamin.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM30,000 di mahkamah ini dan Mahkamah Tinggi, tertakluk kepada alokatur:

(1) Kegagalan responden untuk menjawab surat tuntutan perayu dan fakta bahawa responden tidak membuat laporan polis selepas menerima tuntutan sedemikian apabila kes pembelaan adalah berkaitan kepada pemalsuan melemahkan kekuatan probatif kes pembelaan. Kegagalan untuk menjawab menunjukkan tingkah laku dan adalah fakta relevan dan bukan pengakuan. Ketinggalan hakim bicara yang bijaksana untuk mengambil kira bahawa notis tuntutan perayu dalam perkataan komersial tidak dijawab dan fakta bahawa tiada alasan atau justifikasi

diberikan kerana tidak menjawab kepadanya menjejaskan proses pembuatan keputusan (lihat perenggan 8(a), (d) & (e)).

(2) Peraturan dalam kes *Browne v Dunn* (1893) 6 R 67 tidak dapat diketepikan untuk alasan bahawa responden tidak diwakili pada masa kes perayu dan responden hanya melanggan peguam cara semasa peringkat pembelaan. Kegagalan untuk memeriksa balas atas isu penting mungkin atas fakta kes boleh dianggap diterima kecuali terdapat keterangan lain yang menambat perhatian untuk menyatakan sebaliknya (lihat perenggan 8(g)).

(3) Kegagalan untuk mencabar peguam cara yang menjadi saksi jaminan tersebut adalah serius kepada kes responden. Selanjutnya, surat bertarikh 14 September 2011 yang mana ditandatangani oleh responden sendiri menghancurkan kes responden/atau pembelaannya (lihat perenggan 8(i)–(j)).]

Notes

For a case on evidence, see 7(1) *Mallal's Digest* (5th Ed, 2015) para 634.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chan Ching Chuen & Ors & another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Billion Origin Sdn Bhd v Newbridge Networks Sdn Bhd & Anor (Yap Burgess Rawson International Sdn Bhd, third party) [2006] 6 MLJ 768; [2006] 4 CLJ 113, HC (refd)

Browne v Dunn (1893) 6 R 67, HL (refd)

Buncho (M) Sdn Bhd v Q-Stationers Sdn Bhd [2010] 7 CLJ 359, HC (refd)

China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1, CA (refd)

Heritage Grand Vacation Club Berhad v Pacific Fantasy Vacation Sdn Bhd [2016] 4 MLJ 389, CA (refd)

PECD Construction Sdn Bhd v Freehold Point Sdn Bhd [2008] MLJU 127; [2008] 3 CLJ 215, HC (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Small Medium Enterprise Development Bank Malaysia Bhd v Champion Growth & Ors [2015] 1 LNS 1320, HC (refd)

Wiedemann v Walpole [1891] 2 QB 534, CA (refd)

Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)

Legislation referred to

Companies Act 1965 Form 49

Evidence Act 1950 ss 8, Illustration (g), 17, 45, 46

Appeal from: Civil Suit No 22NCVC-731–12 of 2013 (High Court, Shah Alam)

Nor Shahadah bt Saari (Shukor Baljit & Partners) for the appellant.
Surindar Singh (Surindar, Su & Assoc) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/plaintiff appealed against the decision of the learned High Court judge who dismissed the appellant's claim against the fifth defendant/respondent who on record was a director as well as a signatory to the joint and several guarantee and indemnity agreement ('guarantee') executed by the respondent.

[2] The main line of defence of the respondent was that (i) he was not a director of the company and in consequence all documents related to his directorship was forged; (ii) he did not sign the guarantee.

[3] In a 17 pages judgment, the learned trial judge had set out the relevant facts and reasons for his decision. On the face of record, it was a speaking judgment but upon hearing the submission of the appellant, we took the view that the learned trial judge had erred in law as well as fact in coming to the conclusion to deny the judgment to the plaintiff. In the instant case, the learned trial judge failed to take into consideration the following, namely:

(a) the respondent did not respond to the appellant's notice of demand related to a claim of RM3,638,518.87;

(b) the respondent did not make a police report when his case is that the appellant's documents were forged;

(c) the respondent failed to challenge the appellant's solicitor who witnessed the guarantee;

(d) there was no appreciation of the rule in *Browne v Dunn* (1893) 6 R 67, (HL);

(e) the expert witness who gave evidence for the respondent did not deal with the guarantee at all and the signatures he was referring to was in relation to share transfer forms and not the guarantee;

(f) confusion of matters relating to Form 49 and signatures therein;

(g) the letter by the respondent dated 14 September 2011 signed by the respondent as director of the first defendant, and attaching 12 cheques as instalments for payment of debt for the facilities granted to the first

defendant, was an admission of liability as well as destroyed the respondent's defence as well as it affirmed that the respondent was not a witness of truth. The said letter dated 14 September 2011 reads as follows:

CHAMPION GROWTH SDN BHD (483762-A)

C/O 7–1 A, 1st FLOOR, JALAN SR6/1, TAMAN SERDANG RAYA, SERI KEMBANGAN, SELANGOR DARUL EHSAN

Rujukan Tuan: LIT/12834/09/SMF-54

Tarikh: 14hb September 2011

Bank Perusahaan Kecil & Sederhana Malaysia Berhad

Menara SME Bank

Tingkat 12

Jalan Sultan Ismail

50774 Kuala Lumpur

U/P: Puan Christina Abdul Manaf/ Mariam binti Atan

Tuan,

CHAMPION GROWTH SDN BHD

PENAGGUHAN TINDAKAN UNDANG-UNDANG SEMENTARA DAN CADANGAN PEMBAYARAN

Dengan hormatnya kami merujuk perjumpaan di pejabat tuan pada 14hb September 2011 serta perbincangan mengenai pembayaran balik pinjaman berkenaan.

Seperti dalam perbincangan, perniagaan kami masih tidak memuaskan. Ini kerana syarikat besar seperti AIA, Rockwil dan lain-lain enggan memberikan kontrak kepada syarikat kami. Mereka semuanya ini hilang yakin ke atas kami. Oleh itu, pada masa kini kami hanya dapat kontrak kerja kecil sahaja. Maka pendapatan kami hanya cukup membiayai perbelanjaan seperti gaji pekerja, air, elektrik, stationary dan perbelanjaan harian.

Kami sebenarnya mendapat jumpa dengan beberapa pelabur untuk melaburkan modal ke dalam syarikat ini, tetapi apabila mereka memeriksa akaun syarikat ini dapati liabilities tanggungan sebanyak RM4.5 juta. Mereka ini dengan serta-merta menarik diri.

Oleh itu, dalam proses pemulihan balik perniagaan bukan sahaja perlu banyak perkara perlu diuruskan serta mengumpulkan modal untuk pembiayaan operasi pembelanjaan tetapi perlu banyak masa untuk memulihkan keyakianan dari klient lama.

Kami di sini ingin meminta pihak SME dapat menimbangkan keadaan kami serta cadangan-cadangan kami berikutnya dengan menangguh-kan tindakan undang-undang terhadap syarikat ini.

Olen itu kami perlu sedikit masa lanjutan sebanyak 12 bulan siap sedia menguruskan proses permulihan pernagaan. Kami bercadang membayar balik kaedah bulanan sebanyak RM1,000 sebulan bagi 12 bulan. Adalah dimaklumkan kami juga perlu bayar balik caruman EPF bulanan sebanyak RM120,000 sebanyak 36 bulan Selain kami juga perlu membayar balik Socso serta Fuji-Xerox (maintenanace fees).

Disini kami mengemukakan 12 keping cek-cek sebanyak RM12,000 untuk bayaran kaedah bagi 12 bulan.

Pertimbangan tuan yang sewajarnya amatlah dihargai.

Sekian, terima kasih.

Yang benar

BAGI PIHAK CHAMPION GROWTH SDN BHD

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LIM WOON KATT

Pengarah syarikat

[4] We heard the appeal on 21 June 2016 and allowed the appeal with costs of RM30,000. My learned sister Umi Kalthum bt Abdul Majid JCA and brother Varghese George Varughese JCA have read the judgment and approved the same.

BRIEF FACTS

[5] The learned trial judge had meticulously set out the facts and the reasons. To save courts time, we do not wish to repeat save to say that this judgment must be read together with the judgment of the learned trial judge which is reported in *Small Medium Enterprise Development Bank Malaysia Bhd v Champion Growth & Ors* [2015] 1 LNS 1320.

[6] The facts relate to facility agreement and the principal debtor was Champion Growth Sdn Bhd ('the first defendant') and the second to the fifth defendants were guarantors. Judgment had been entered in respect of the first to fourth defendants. The appeal was in respect of the respondent who was the fifth defendant.

[7] The issues to be tried before the High Court, inter alia, were:

(a) whether the fifth defendant had executed the guarantee? and

(b) whether the fifth defendant is liable to the plaintiff as guarantor?

The respondent's defence had been summarised by the learned trial judge as follows:

Fifth defendant's defence

(1) That he did not have any knowledge of the transaction as his signature was forged in a document, ie, Form 49 of the Companies Act, that made the fifth defendant a director of the first defendant.

(2) The fifth defendant had given a statement that he was not any time a director or shareholder of the first defendant and his signature was forged to benefit the first defendant. The fifth defendant also maintains that he had never signed any guarantee documentation with the plaintiff.

(3) The fifth defendant believes that his signature was forged by one person named Tan Peng Hin ('Frank') (K/P No 600128–04–5347), the first defendant company's Chief Executive Officer's ('CEO'). Further, that the said Frank had in his possession the fifth defendant's identification card ('NRIC').

(4) The fifth defendant had never at any material time been the first defendant's director and has no privity with the first defendant nor the plaintiff that authorised him to sign the said guarantee agreement for the first defendant's loan taken from the plaintiff in his purported capacity as the first defendant's director.

(9) Defendant 5 alleged that his signature had been forged in the documents material to this claim and contended that, therefore, the onus lay on him to prove the alleged forgery of his signature on a balance of probabilities which is the applicable standard of proof for forgery. He cited in support the case of *Yong Tim v Hoo Kok Chong and Anor* [2005] 3 CLJ 229 which stated the law correctly as follows:

> [2] With regard to the standard of proof to be applied in civil proceedings, a clear distinction must be drawn as between 'forgery' and 'fraud'. The general rule is that proof in civil proceedings of facts amounting to the commission of a crime (including forgery) need only be on a balance of probabilities. However, the common law of Malaysia has developed an exception to this general rule; hence, where fraud (as opposed to forgery) is alleged in civil proceedings, it (the alleged fraud) has to be proved beyond a reasonable doubt.

(10) Defendant 5 further submitted that the determinant question that has to be answered in regard to his pleaded defence was whether he had proved on the above standard that his impugned signature on the relevant document that made him a director of the first defendant company had been forged?

[8] We had read the appeal records and submissions of the learned counsel. We thanked the learned counsel for their able submissions. After giving much consideration to the submission of the learned counsel for the respondent, we took the view that it was a fit and proper case to allow the appeal. Our reasons, inter alia, were as follows:

(a) in the instant case, it was not in dispute that the respondent did not respond to the demand notice of the plaintiff and the defence alleging that he was not liable was only raised in the statement of defence. Evidently, failing to respond to the plaintiff's letter of demand, that too

when the defence case was related to forgery, as well as the fact that the respondent did not lodge a police report upon receiving the demand, weakened the probative force of the defence case. In *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155, the Court of Appeal went to the extreme end to say that failure to respond on the facts of the case should lead to entering of judgment. Justice Gopal Sri Ram JCA at p 288 (MLJ); p 159 (CLJ), had this to say:

> On December 17, 1991, the respondent wrote to the appellant confirming an agreement between them whereby the former was to receive an additional fee of RM100,000 if he assisted in resolving the problem regarding the access. It is the respondent's case that he did in fact obtain the required access through his exertions. The appellant, however, denies any agreement to pay the additional fee. In respect of this sum, the learned Judge granted leave to defend. We would digress for a moment to say a few words about this latter order of the learned judge.
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> During argument, we registered our surprise at the learned judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant;

(b) in abundance of caution we must say that failure to respond must not be equated to admission of the claim under s 17 of the Evidence Act 1950 ('the EA 1950'). Failure to respond will relate to conduct under s 8 of the EA 1950. Conduct is a relevant fact for the court to take into account to give the relevant probative force to the version of the plaintiff and/or defendant's case. It is well settled that not all demand notices must be responded. In *Wiedemann v Walpole* [1891] 2 QB 534, in an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise;

(c) it must also be noted that in commercial cases (not civil), courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree (see *PECD Construction Sdn Bhd v Freehold Point Sdn Bhd* [2008] MLJU 127; [2008] 3 CLJ 215);

(d) there is a latin maxim which says 'silence amount to consent' (see *Quit tracet consentire videtur*). However, this is not part of our law of evidence. Failure to respond goes to conduct and is a relevant fact and not an admission as stated in illustration (g) of s 8 of the EA 1950, which reads as follows:

(g) The question is whether A owes B RM10,000. The facts that A asked C to lend him money, and that D said to C in A's presence and hearing: 'I advise you not to trust A for he owes B RM10,000,' and that A went away without making any answer are relevant facts;

(e) in the instant case, the learned trial judge failed to take into account that the appellant's demand notice in a commercial matter was not responded to. Further there was no reason or justification for not responding to it. The omission of the learned trial judge to do so in our view compromised the decision making process;

(f) in the instant case, it was not in dispute that the respondent did not challenge the evidence of the witnessing solicitor during cross-examination. The appellant's case had been well captured by the learned trial judge and it reads as follows:

Plaintiffs case against defendant 5

[11] The plaintiffs claim against defendant 5 is premised on the allegation that defendant 5 together with defendant 4 had jointly executed the 'joint and several guarantee and indemnity agreement by individual' dated 6 February 2009 ('ExP7'). It was contended that ExP7 could validly be used as evidence as the attesting witness ('PW2'), the advocate and solicitor who attested the signatures of defendants 4 and 5 in ExP7, was called as witness to prove its execution and gave evidence accordingly confirming the execution of the guarantee by defendants 4 and 5. The plaintiff relied on the testimony of PW2 who had purportedly witnessed defendants 4 and 5 affixing their signatures on ExP7. PW2 testified that, in relation to defendant 5, she had inspected his identification card ('IC') before execution of the agreement and witnessed his signature.

[12] The plaintiff submitted that as defendant 5 failed to cross-examine PW2 and thus, had not challenged or rebutted any of the evidence given by her against him, that evidence must be deemed to be accepted as the truth. Reference was made to the trite law principle on this point as expressed in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 as follows:

> On this point we need only to say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[13] The plaintiff brought to the attention of the court the fact that the expert witness produced by the defence, ie, the forensic document examiner ('DW2'), had not made any examination or analysis of the signature purportedly that of defendant 5 appearing in ExP7. As such, that both defendants 4 and 5 had failed to prove the allegation that their signatures appearing in ExP7 had been forged. DW2 himself, based on his experience and expertise, had concluded that there were no elements of cheating or forgery in respect of the signatures in ExP7. His evidence on this issue, it was submitted, should be accepted by the court by reference of ss 45 and 46 of the

Evidence Act 1950. *Dr Shanmuganathan v Periasamy a/l Sithamharam Pillai* [1997] 3 MLJ 61 referred to.

[14] It was further submitted that both defendants 4 and 5 by their conduct in the course of dealing with the plaintiff's officers had clearly shown that they had never raised the issue of their signatures in P7 being forgeries. This allegation of forgery or falsification was only made after the commencement of this suit without previously having challenged the authenticity and validity of the guarantees executed by them. Hence, that this serious allegation was no more than an afterthought to defeat the plaintiff's legitimate claim. Neither had they lodged any police report alleging that their signatures had been forged in the guarantee ('P7') causing them to wrongfully suffer losses. Moreover, defendant 5 had admitted signing letter dated 14 September 2011 ('exP19') as a director of defendant 1 to settle the plaintiffs debt due from the first defendant and had, thereafter issued several cheques pursuant to the agreed settlement;

(g) in the instant case, the signature in the guarantee was the main issue and the most relevant witness was the solicitor who witnessed the signature. The learned counsel for the respondent was candid to say that the respondent did not challenge when the solicitor gave evidence and the reason the learned counsel advanced was that the respondent was not represented at the time of the appellant's case and the respondent only engaged a solicitor during the defence stage. We do not think the rule of *Browne v Dunn* can be waived for reasons stated by the learned counsel for the respondent. The rule in *Browne v Dunn* is well established in Malaysia (see *Aik Ming (M) Sdn Bhd & Ors v Chan Ching Chuen & Ors & another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639; *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; *Billion Origin Sdn Bhd v Newbridge Networks Sdn Bhd & Anor (Yap Burgess Rawson International Sdn Bhd, third party)* [2006] 6 MLJ 768; [2006] 4 CLJ 113). Failure to cross-examine on vital issues may on the facts of the case be deemed to be accepted unless there are other compelling evidence to say otherwise (see *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1);

(h) trial courts must not fail to recognise the evidential significance of the rule in *Browne v Dunn* , though the strict rule has limited exception. The rule as well as the limited exception were dealt in *Buncho (M) Sdn Bhd v Q-Stationers Sdn Bhd* [2010] 7 CLJ 359, where Hamid Sultan bin Abu Backer JC sitting in the High Court, had this to say:

(d) The plaintiff's argument on these issues that the defendant failed to cross-examine PW1 on the design is fatal and has no merits. And relies on the Court of Appeal decision in *Aik Ming (M) Sdn Bhd & Ors v Chan Ching Chuen & Ors & another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 where it was stated:

It is essential that a party's case be expressly put to his opponent's material

witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case ...

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is a rule of essential justice ... if he asks no question with regard to this, then he must be taken to accept the plaintiffs' account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he finished the evidence of his witness and when he has no further chance to meet the new case made which was never put and secondly, because subsequent testimony has no chance to be tested and corroborated.

The words echoed by the Court of Appeal have its roots in *Sarkar on Evidence* (14th Ed), p 2006, which reads as follows:

> Effect of omitting or not cross-examining a witness on essential points. The skilful cross-examiner must hear the statements in examination-in-chief with attention, and when his turn comes, he should interrogate the witness on all material points that go against him. If he omits or ignores them, they may be taken as an acceptance of the truth of that part of witness's evidence. Generally speaking, when cross-examining, a party's counsel should put to each of his opponent's witnesses, in turn, so much of his own case as concerns that particular witness or in which he had a share. Thus, if a witness speaks about a conversation, the cross-examining lawyer must indicate by his examination how much of the witness's version of it he accepts and how much he disputes, and to suggest his own version. If he asks no questions, he will be taken to accept the witness's account (*Flanagan v Fahy* [1918] 2 IR 361 at pp 388–89, CA; *Browne v Dunn* ; see *Odgers' Pleading (13th Ed) p 261;* Powell (9th Ed) p 531: Wig Vol 2 para 1371; Phipson (11th Ed) p 649; see also *Chunilal v H F Ins Co, A* [1958] Pu 440; *Babulal v Caltex (India) Ld, A* [1967] C 205). Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that is merely a technical rule of evidence. It is a rule of essential justice (*Carapiet v Derderiem, A* [1961] C 359. In this case PB Mukharji J, Relied on and Quoted the Observations of Lords Herschell and Halsbury in *Browne v Dunn* , 6 R 67 at pp 76–7, reproduced under s 146 post under heading: 'Testing veracity and impeaching credit'; *S v Bhola, A* 1969 Raj 220). Therefore an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination, would lead to the inference that the evidence is accepted, subject of course to its being assailed as inherently incredible or palpably untrue (see *Sachindra v Nilima, A* [1970] C 38 at p 63) ... Where however, several witnesses are called to prove the same point, it is not always necessary that they should all be cross-examined.
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> Failure to cross-examine, however, will not always amount to an

A acceptance of the witness's testimony, eg if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character (*Browne v Dunn* ; (quoted in *Sukhraji v STC, A* [1966] C 620)) or the abstention arises from mere motives of delicacy, as where young children are called as witnesses for their parents in divorce cases, or when B counsel indicates that he is merely abstaining for convenience, eg to save time (Phip 11th Ed p 649).

What was stated in *Aik Ming* must not be quoted as a naked and bare statement of the law. Apex proposition must always be seen to be clothed with the law etc. It is trite that the legal burden is on the plaintiff or defendants as C the case may be to establish each and every element necessary to succeed in their pleadings. (see s 101 of Evidence Act 1950). The rules of pleading as to joinder of issue are also relevant when dealing with the proposition stated in *Aik Ming*. *Aik Ming* does not propose to write off the law relating to burden of proof or rules of pleadings. There can be no surprises when the law and D rules of pleadings places the burden on the parties to establish the case. The principles stated in *Aik Ming* is the replica of what was adumbrated by *Sarkar on Evidence* (14th Ed) related to the House of Lords decision in *Browne v Dunn. Sarkar* makes it clear that the rule applies in relation to cross-examining a witness on essential points said in examination-in-chief. It E does not cover issues which are already in dispute before the court. The reason being no parties will be taken by surprise. The issues before the court must be established according to law and one cannot get away citing the rule in *Browne v Dunn* . *Browne v Dunn* does not make the law in respect of legal burden or rules of pleadings relating to joinder of issues otiose. He who F alleges must prove and cannot be equated to being sufficient proof by making the witness available and not leading sufficient evidence in examination in chief. And relying on the purported omission of the defendant to cross-examine on matters which the defendant need not do in law. In *Aik Ming*, the Court of Appeal was careful in its proposition and said 'may' and referred to the testimony in examination in-chief, so were the learned authors G of *Sarkar on Evidence*.

(See *Heritage Grand Vacation Club Berhad v Pacific Fantasy Vacation Sdn Bhd* [2016] 4 MLJ 389);

H (i) we took the view that the failure to challenge the witnessing solicitor of the guarantee was fatal to the respondent's case; and

(j) in addition, the letter dated 14 September 2011 which was signed by the respondent himself (reproduced earlier) destroyed the respondent's case and/or his defence. I

[9] For reasons stated above, we allowed the appeal with costs of RM30,000 for here and below and subject to allocatur. Deposit to be refunded.

We hereby ordered so.

Appeal allowed with costs of RM30,000 here and below, subject to allocatur.

Reported by Dzulqarnain Ab Fatar